Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-532

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LOUIS GUGLIELMI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS GUGLIELMI

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway
New York, NY 10007
(212) 513-7676

Attorneys for Petitioner
Louis Guglielmi

Victoria B. Eiger
Of Counsel

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

REPLY BRIEF.....1

CONCLUSION.....7

TABLE OF AUTHORITIES

Hutto v. Davis,
454 U.S. 370 (1982).....2

O'Neil v. Vermont,
144 U.S. 323 (1892).....6

Solem v. Helm,
463 U.S. 277 (1983).....4

Rummel v. Estelle,
445 U.S. 263 (1980).....2

United States v. Rhodes,
779 F.2d 1019 (4th Cir. 1985),
cert. denied, 476 U.S. 1182 (1986).....3

REPLY BRIEF OF PETITIONER LOUIS GUGLIELMI

In its brief in opposition to the Petition for a Writ of Certiorari, the United States concedes that the Court of Appeals for the Fourth Circuit erred in failing to conduct a proportionality review of the 25-year sentence imposed in this case. (Brief for the United States in Opposition at 11, n.4)

It follows from the government's concession that the proper course is to remand the case to the Court of Appeals for the Fourth Circuit with directions that it conduct the proportionality review which it erroneously held was foreclosed. Given the government's concession, it is wholly inappropriate for it to argue that this Court should decide the proportionality question

itself -- without full briefing of the issue -- via a decision on whether or not to grant certiorari.[1]

The issue of proportionality was extensively briefed in the Court of Appeals, but was never reached there because of the Fourth Circuit's erroneous determination that it could not consider the sentence's proportionality.[2] That Court is in a far

---

[1]The government argues that this Court need not correct the Fourth Circuit's error because, according to the government, the sentence is sufficiently proportionate to satisfy the Eighth Amendment. Brief for the United States in Opposition at 11, n.4. Its reliance on Rummel v. Estelle, 445 U.S. 263 (1980), and Hutto v. Davis, 454 U.S. 370 (1982), for the proposition that Petitoner's sentence passes constitutional muster is misplaced. Rummel involved a third felony offender. Davis concerned an active drug dealer who had sold drugs to be smuggled into prison, had sold drugs to an inmate's wife who was alone with an infant child, and who had himself been convicted before. 454 U.S. at 372, n.1. In contrast, this is Petitioner's first conviction.

[2]In a grotesque twist, the government seems to blame Petitioner for the Fourth Circuit's

(footnote continued)

better position to decide the proportionality question in the first instance than is this Court and, given the extraordinary demands on this Court's resources, remand to the Court of Appeals represents an appropriate allocation of judicial resources.

Alternatively, if this case is not to be remanded to the Court of Appeals, this Court should grant certiorari, and permit full

---

(footnote continued from previous page) erroneous ruling. See Brief of the United States at 11, n.4. This is surely a case of blaming the victim. It fact, it was the government, in the first line of its first argument in its brief to the Court of Appeals, who told the court that the proportionality issue had already been decided by the court in United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986). See Brief for Appellee at 12 & n.2. In his petition for rehearing and rehearing en banc, Guglielmi argued that Rhodes did not stand for the broad proposition that no sentence of a term of years is subject to scrutiny under the Eighth Amendment, pointing out that the Rhodes Court had performed a proportionality review in upholding the sentences at issue in that case. Petition for Rehearing and Suggestion for Rehearing en banc of Defendant-Appellant Louis Guglielmi at 12 & n.7.

briefing of the proportionality question.[3] To deny certiorari would not only leave standing a sentence which no court has reviewed for its validity under the Eighth Amendment but would also leave standing a holding in the Fourth Circuit that the Court of Appeals is powerless to review for proportionality any sentence less severe than a life sentence without parole, a holding which the United States admits is inconsistent with this Court's decisions.

---

[3]While the government's brief purports to analyze the 25-year sentence under the framework established by this Court in Solem v. Helm, 463 U.S. 277 (1983), its analysis does not address all the relevant factors. For example, it does not even attempt to demonstrate that the 25-year sentence is comparable to sentences imposed for obscenity crimes in other jurisdictions. Nor does the government make any serious attempt -- beyond its own ipse dixit -- to demonstrate that obscenity crimes are as or more serious than other crimes such as first degree murder, kidnapping, burglary and rape for which much lesser sentences are regularly imposed.

Finally, it must be noted that the government misleadingly recasts Petitioner's argument concerning the invalidity of the five consecutive sentences imposed as simply a claim -- divorced from the Eighth Amendment -- that imposition of consecutive sentences for separate shipments of films was improper under the obscenity statute. Notwithstanding the government's attempt to bifurcate Petitioner's argument, it is part and parcel of his Eighth Amendment claim.

Under the government's analysis concerning "the unit of prosecution," the FBI need not have stopped after placing three separate orders for films it believed were obscene. Rather, according to the government, it could have continued to order films from the Petitioner indefinitely, thereby increasing his exposure without limit, and

without offense to the Constitution.[4]

Petitioner maintains that that is not the law. See O'Neil v. Vermont, 144 U.S. 323, 337 (1892).

[4]The cases it cites -- none of which involves a course of conduct in which the government was the moving force -- surely do not support that view.

CONCLUSION

For the reasons stated above and in the Petition for a writ of certiorari, the Petition for a writ of certiorari should be granted or the case remanded to the Court of Appeals.

Respectfully submitted,

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Nathan Z. Dershowitz
Victoria B. Eiger
Dershowitz & Eiger, P.C.
225 Broadway
New York, New York 10007
(212) 513-7676

Dated: December 10, 1987
New York, New York